

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

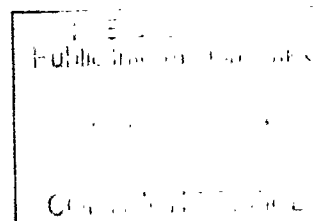
In the Matter of)

)
Distribution of the 2004, 2005, 2006, 2007,)
2008 and 2009 Cable Royalty Funds)

Docket No. 2012-6 CRB CD 2004-2009
(Phase II)

SEP 09 2016

Copyright Royalty Board



In the Matter of)

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Distribution of the 1999-2009 Satellite)
Royalty Funds)

Docket No. 2012-7 CRB SD 1999-2009
(Phase II)

**SETTLING DEVOTIONAL CLAIMANTS' REPLY IN SUPPORT OF THEIR MOTION
FOR ENTRY OF A DISTRIBUTION ORDER AND MOTION TO STRIKE AMENDED
DIRECT STATEMENT OF INDEPENDENT PRODUCERS GROUP**

The Settling Devotional Claimants ("SDC") submit this Reply to support their Motion for Entry of Distribution Order ("Distribution Motion") based on the shares proposed by Independent Producers Group ("IPG") in the Devotional Category in Docket No. 2012-7 CRB SD 1999-2009 (Phase II), covering satellite royalty years 1999-2009, and at the same time move to strike IPG's Amended Direct Statement. We combine these pleadings, because they address overlapping issues, and because we believe it is more efficient and proper to deal with these matters in a single document, rather than burdening the Judges and the parties with duplicative filings.

I. IPG's Amended Direct Statement is Improper and a Legal Nullity.

First, the SDC note that the MPAA filed a Motion to Strike IPG's Amended Direct Statement ("MPAA Motion") on September 2, 2016. The SDC fully support the MPAA Motion.

IPG's Amended Direct Statement did not identify what had changed, did not demonstrate that those changes were based on discovery, and was made without IPG's seeking leave of the Judges; therefore, the filing is not permitted by the Judges' rules. 37 C.F.R. § 351.4(c). Further, in federal practice, an amended pleading not authorized by the rules and filed without leave of court is a legal nullity and has no effect. *See Schmidt v. United States*, 749 F.3d 1064, 1069 (D.C. Cir. 2014) (court "rightly disallowed [plaintiff's] amended complaint, which, absent consent or leave of court, was without legal effect"); Moore's Federal Rules Pamphlet § 15.3 ("if leave of court to amend is required, an amended pleading filed without obtaining leave is a nullity and the original pleading stands").

Moreover, when a party "blatantly changes his statement of the facts in order to respond to [an opposing party's] motion ... a court is authorized to accept the facts described in the original complaint as true." *Hourani v. Mirtchev*, 943 F. Supp.2d 159, 171 (D.D.C. 2013). This is precisely what happened here. IPG's amended filing is a clear attempt to avoid the Distribution Motion filed by the SDC, and to prolong unnecessarily these proceedings in spite of the SDC's consent to IPG's original satellite proposal – possibly for the purpose of obtaining settlement leverage in other proceedings, or for other ulterior motives. The Judges should give the Amended Direct Statement no credence or effect, and should accept the satellite shares offered by IPG in its original direct statement and consented to by the SDC.

II. IPG's Representations that the Methodology Propounded in the Amended Direct Statement "Was Not Modified" and that the Amended Direct Statement Merely Corrected Calculations that were "Incorrect" are False.

In IPG's Opposition to the Motion for Entry of Distribution Order ("Opposition"), IPG repeatedly claims that in the aftermath of filing its Direct Statement, it found its original calculations were "incorrect," "errant," and "inaccurate." Opposition at 1, 2, and 3. IPG states

that once it learned of the calculation errors, the Amended Direct Statement was filed. Right up front, IPG represents unequivocally that “the *methodology* propounded therein *was not modified.*” Opposition at 1 (emphasis added). Despite these assertions, the Amended Direct Statement itself shows otherwise. Most significantly, the crucial calculation equations in paragraphs 32 and 34 of the original IPG Direct Statement were modified. In particular, the calculation equation in paragraph 32 was changed in the Amended Direct Statement from a linear equation to a logarithmic equation:

Original

$$\begin{aligned} \text{Subscribers} = & a + \sum_{i=1}^{\text{\# years}} b_i * \text{Indicator}_{\text{Year}} + \sum_{p=1}^{\text{\# call signs}} c_p * \text{Indicator}_{\text{Call Sign}} \\ & + e * (\text{\#_IPG_dev_shows}) + f * (\text{\#_SDC_dev_shows}) \\ & + g * (\text{\#_IPG_ProgSupp_shows}) + h * (\text{\#_MPAA_shows}) \end{aligned}$$

Amended

$$\begin{aligned} \text{\underline{Ln}}(\text{Subscribers}) = & a + \sum_{i=1}^{\text{\# years}} b_i * \text{Indicator}_{\text{Year}} + \sum_{p=1}^{\text{\# call signs}} c_p * \text{Indicator}_{\text{Call Sign}} \\ & + e * (\text{\#_IPG_dev_shows}) + f * (\text{\#_SDC_dev_shows}) \\ & + g * (\text{\#_IPG_ProgSupp_shows}) + h * (\text{\#_MPAA_shows}) \end{aligned}$$

Compare IPG Direct Statement at 8, equation (1) with IPG Amended Direct Statement at 8, equation (1) (emphasis added to amended equation).

The other notable change occurred with equations in paragraph 34, which Dr. Cowan changed from linear equations to exponential equations in the Amended Direct Statement:

Original

$$A = e * \sum_{p=1}^{\text{\# call signs}} \text{\#IPG_dev_shows}_p$$

$$B = f^* \sum_{p=1}^{\text{\# call signs}} \text{\#SDC_dev_shows}_p$$

Amended

$$A = \underline{\exp} \left(e^* \sum_{p=1}^{\text{\# call signs}} \text{\#IPG_dev_shows}_p \right)$$

$$B = \underline{\exp} \left(f^* \sum_{p=1}^{\text{\# call signs}} \text{\#SDC_dev_shows}_p \right)$$

Compare IPG Direct Statement at 8, equations (2)-(3) *with* IPG Amended Direct Statement at 8, equations (2)-(3) (emphasis added to amended equation).

Although the changes in the formulas may appear subtle, they are in fact fundamental to the proposed measure of value. Declaration of Erkan Erdem, Ph.D., at ¶ 3. The terms in Dr. Cowan’s formulas are not well defined, so it is difficult to evaluate the methodologies fully. However, according to the SDC’s expert, Dr. Erkan Erdem, the computational formulas have the effect of changing the dependent variable in Dr. Cowan’s regression from the number of subscribers to the natural logarithm of the number of subscribers, with no explanation why this would be a more appropriate regression. Erdem Dec. at ¶ 6. As Dr. Erdem explains, “A change in the functional form of a regression model is a modification to the methodology and not a correction in the calculations.” Erdem Dec. at ¶ 6.

While IPG’s Opposition hides the changes behind a wall of mumbo-jumbo, it appears that, based on the timing of the filing, the real motivation for the submission was not to correct errors in calculations, but rather to dissuade the Judges from accepting the SDC’s Distribution Motion to end the controversy and accept the IPG results. It is plain that once IPG received the SDC’s Distribution Motion and absorbed the import of what it had tendered in its Direct

Statement, IPG scurried to modify its methodology solely because it did not like its own results. IPG then proceeded to bury this change in an amended filing which failed to even identify or explain the modifications. It should be a red flag to the Judges that IPG chose to submit its Opposition to the Distribution Motion without any declaration from Dr. Cowan explaining what errors he putatively made, or even stating that his calculations based on the original formula were erroneous.

III. The SDC's Consent to IPG's Original Proposed Satellite Shares Removes Controversy and Allows the Judges to Distribute the Satellite Funds Pursuant to the Copyright Act.

IPG suggests that the SDC's Distribution Motion indicates that the SDC consents to the IPG methodology for both satellite and cable cases, although whether it is the methodology of the amended or original direct statement is unclear. Opposition at 2-3. In any event, that is certainly not correct. The SDC's Distribution Motion acknowledges that despite a material dispute about proper methodology to allocate shares, IPG's original satellite results, by happenstance or otherwise, were acceptable to the SDC, thus eliminating any controversy regarding their disbursement. Motion at 2, n.1. As the Judges determined with respect to the 2008 Satellite Funds in the Devotional Category, despite different methodologies, both IPG and the SDC agreed on a division of shares; hence, there was no controversy and the Judges could distribute funds pursuant to the Copyright Act, Section 801(b)(3)(A), 17 U.S.C. § 801(b)(3)(A). *Order Granting Final Distribution of 2008 Satellite Royalties for the Devotional Category*, Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and Docket NO. 2012-7 CRB SD 1999-2009 (Phase II) (Dec. 22, 2015) ("*2008 Order*"). As noted at the outset, IPG cannot retroactively manufacture disagreement by improperly filing an amended pleading, because the Amended Direct Statement has no legal effect, and its filing is prejudicial to the SDC.

There is also no basis whatsoever to suggest that the SDC's Distribution Motion requires that the Board adopt IPG's methodology for the satellite or cable distributions. Indeed, in the *2008 Order*, the Judges encouraged the SDC and IPG to reach an agreement "where opposing parties propose the same or substantially the same allocation percentages." *Id.* at 2, n 4. Clearly, agreement could be reached based strictly on the percentages, without conceding any commitment to the opposing party's methodology. Further, the SDC's Distribution Motion is unrelated to the cable cases or the methodology that is appropriate in those cases. As has been clear in the various contested Phase II proceedings covering 1999-2009, the SDC and IPG have fundamental disagreements regarding the distribution methodology, as well as shares derived from those methodologies. Therefore, if one participant consented to the other's results, for example cable allocations in one or more years, there would be *no controversy* for that year, but also *no agreement* on how the controversy was eliminated. From the Judges' perspective, what should matter is whether there is a controversy over the results, not the methodology that supports those results. Indeed, since the inception of the compulsory licensing system, Phase I and Phase II parties have often reached accord on shares without conceding that an opposing party's distribution methodology was acceptable.

IPG's reference to the D.C. Circuit's decision in *Settling Devotional Claimants v. Copyright Royalty Board, et. al.*, Case No. 13-1276 (D.C. Cir. Aug. 14, 2015) is inapposite. That ruling does *not* prohibit a distribution order on grounds of consent. It simply held that there must be substantial evidence to support the Judges' adoption of a methodology for distribution when there is a dispute over the results. *Id.* at 24-25. In this case, the numbers proposed in IPG's original Direct Statement were reasonably supported by the SDC's own analysis, and the SDC were therefore willing to consent to them. *See 2008 Order* at 2, n. 4. The SDC are indifferent to

IPG's methodology in reaching those numbers, and the SDC's acceptance of the results does not imply acceptance of the methodology. If there is no controversy over the results, there is no need for the Judges to decide between methodologies.

Finally, IPG ironically alleges that the SDC "cherry-picked" when they accepted *all* of IPG's proposed satellite distributions in *every* satellite royalty year. Opposition at 2. There is no need for the Judges to decide now whether a "cherry-picking" problem would prevent a participant from consenting to an opponent's proposed distributions in some years but not in others, in order to take unjust advantage of a natural rise and fall that may result from a particular methodology. That problem is not presented where the SDC, following the suggestion of the Judges in the *2008 Order*, have concluded that the parties are close enough and thus have accepted all of IPG's original proposed satellite distributions over a continuous period of eleven years (including 2008, which was already distributed), in order to save both parties and the Judges the time, cost and effort needed to resolve minor differences.

IPG gamely suggests that it could have just as easily consented to the SDC's proposed satellite shares, some of which would have given IPG a slightly higher award than its own proposed shares. If IPG had accepted the SDC's proposed satellite shares, then the SDC would have had no grounds to complain. But IPG did not accept the SDC's proposed satellite shares, and even made a concerted effort to change its own results substantially in order to avoid the consequences of the SDC's acceptance of IPG's proposed shares.

IV. IPG Should Be Estopped from Amending Its Methodology and Share Proposals.

Even if IPG's Amended Direct Statement had been properly filed, it should be stricken on estoppel grounds. The shares of satellite royalties in the Amended Direct Statement are inconsistent with those in its original Direct Statement filed on August 22, 2016. This

inconsistency, combined with the timing of the filing, gave IPG an unfair advantage in this litigation by inducing the SDC to consent to figures that it then changed, and also by harming the ability of the SDC to formulate initial discovery requests.

Judicial estoppel can be applied when “the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). This doctrine grants the Judges the discretion to exclude inconsistent positions when justified by the specific factual context. *Id.*

The related doctrine of equitable estoppel operates in a similar manner. IPG should be equitably estopped because the SDC have acted “in reliance upon the other party’s conduct by which [they] will now be prejudiced if the facts are shown to be different from those upon which [they] relied.” *Galt v. Phoenix Indem. Co.*, 120 F.2d 723, 726 (D.C. Cir. 1941).

Under either formulation, the result is clear: estoppel prevents a party that seeks to gain an advantage or who misleads the court and parties in litigation from changing its position to the detriment of opposing parties. Here, IPG cannot be allowed, “simply because [its] interests have changed, [to] assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken.” *New Hampshire*, 532 U.S. at 749. Yet, IPG filed its Amended Direct Statement only after the SDC had already acquiesced in the first position taken on satellite shares.

IPG’s change in its position prejudiced the SDC. First, IPG has gained a strategic advantage by inducing the SDC into tipping their hand on an entire category of the cases in this proceeding. After learning that the SDC were willing to accept the numbers filed in its initial statement, IPG filed a new statement in which those numbers were materially higher, and gained

potentially valuable information related to the SDC's litigation and settlement strategy. A participant should not be able to probe an opponent in this way.

Second, IPG has gained an advantage in discovery. Because the Amended Direct Statement was filed one day before discovery requests were due, and especially because IPG did not identify or explain the changes in the Amended Direct Statement, the SDC were deprived of a full opportunity to review the new changes and prepare discovery requests about them.

This is similar to the actions in the *New Hampshire* Supreme Court case, where the State of New Hampshire had previously proposed a definition be adopted by the Court in a boundary dispute with the State of Maine. The Supreme Court concluded that, because the parties both agreed to the proposed definition, it "reasonably invested imprecise terms with a definition not wholly contrary to relevant evidence," and therefore was acceptable. *New Hampshire*, 532 U.S. at 747. In later litigation, New Hampshire sought a revised boundary that was "more favorable" to its interests, which the Court interpreted as an "inconsistent interpretation to gain an additional advantage." *Id.* at 755.

In its Opposition, IPG argues that "the calculations placed in the statement were incorrect" and this is the reason it has changed its position. Opposition at 1. The state of New Hampshire made a similar argument, asserting that its original position was taken without a "searching historical inquiry" into the facts. The Supreme Court dismissed this argument because of the ample opportunity that New Hampshire had been given to present its case. *New Hampshire*, 532 U.S. at 753-54. IPG had ample opportunity to develop its calculations and methodology with expert testimony. There is no evidence that the calculations developed pursuant to the original formulas were in fact "incorrect." The SDC consented to those original calculations.

The bottom line taught even youngsters in elementary school: be careful what you ask for, because you might get it.

CONCLUSION

For the foregoing reasons, the Judges should strike IPG Amended Direct Statement and should grant the SDC's Motion for Entry of a Distribution Order.

September 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

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